

STATE OF MICHIGAN
COURT OF APPEALS

BERT R. DALMAYER,

Plaintiff-Appellant,

v

DANIEL W. WHITE and BOYCE, WHITE,
WERTH & MACK,

Defendants-Appellees.

UNPUBLISHED

March 10, 2005

No. 251545

Alpena Circuit Court

LC No. 02-003196-NM

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIUM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant Daniel White, an attorney, was hired to represent plaintiff after he was charged with operating a motor vehicle while under the influence of liquor. Plaintiff was offered a plea agreement to plead guilty to a reduced charge of reckless driving or operating a vehicle while impaired, but, because he was a self-employed appliance repairman, he was concerned about losing his driver's license. White admitted that he erroneously advised plaintiff that, by pleading guilty to reckless driving, he would be able to obtain a restricted license for employment purposes. Plaintiff subsequently pleaded guilty to reckless driving. At the plea hearing, the following colloquy occurred:

THE COURT: You understand that this is a misdemeanor which is punishable by 90 days in jail and up to \$100.00 fine plus Costs [sic] or both. . . .

But, in any event, once they [the Secretary of State's Office] get the abstract of conviction they are going to suspend your driving privileges for 90 days, and they don't allow a permit during that 90 day suspension period. . . .

Do you understand all that?

MR. DALMAYER: Yes, your Honor.

After providing the court with a factual basis for his plea, plaintiff admitted that he was pleading guilty freely and voluntarily and that no other promises, other than the plea agreement, had been made to him in exchange for his plea.

Because of a recent change in the law, plaintiff's driver's license was required to be suspended for ninety days and he was not eligible for a restricted license during that period. After plaintiff's license was suspended, he hired another attorney and was allowed to withdraw his guilty plea to reckless driving and enter a plea to operating a vehicle while impaired so that he could get his driver's license back. Plaintiff was without his driver's license for fifty-two days, which he alleges severely affected his ability to work, and he commenced this action against defendants for legal malpractice.

Defendants moved for summary disposition, arguing that plaintiff's admissions in open court at the plea hearing precluded him from claiming that White's erroneous advice proximately caused plaintiff's alleged damages. The trial court agreed and granted defendants' motion.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that, but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the "suit within a suit" requirement in legal malpractice cases. [*Id.*]

Plaintiff is correct that the record establishes that White gave him erroneous legal advice about the consequences of pleading guilty to reckless driving. But White's erroneous advice is not enough to establish a claim for legal malpractice. Because the judge at the plea hearing correctly advised plaintiff that, by pleading guilty, his driver's license would be suspended for ninety days and he could not obtain a driving permit during that period, and because plaintiff acknowledged that he understood these consequences, plaintiff cannot show that White's alleged negligence was the proximate cause of his damages. Notwithstanding White's erroneous advice, plaintiff agreed to plead guilty to reckless driving after acknowledging that he understood that he would not be able drive for ninety days. Accordingly, the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell